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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

Appellants,

vs.

ATLANTA, BIRMINGHAM & COAST
RAILROAD COMPANY

Appellee.

No. 88

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE NORTHERN
DISTRICT OF GEORGIA

BRIEF ON BEHALF OF ATLANTA, BIRMINGHAM & COAST RAILROAD CO.

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PART ONE

REFERENCE TO THE OPINIONS DELIVERED AND ORDERS ENTERED BY THE COURT BELOW AND BY THE INTERSTATE COMMERCE COMMISSION

This appeal is from a final decree of the United States District Court for the Northern District of Georgia (presided over by Mr. Circuit Judge Walker, Mr. District Judge Sibley

and Mr. District Judge Dawkins) entered on the 18th of January, 1930 (R. 503, Opinion R. 499, reported 37 Fed. 2nd, 401). This decree was entered on a supplemental bill filed by the Atlanta, Birmingham and Coast Railroad Company against the United States to enjoin an order of the Interstate Commerce Commission dated October 9th, 1929 (R. 486), wherein the Commission attempted to construe a condition in its former order of December 21st, 1926, to mean that said condition required appellee to set up its common and preferred stock on its books at $9,261,043.87.

Prior to this decree the same court had on October 26th, 1928, rendered a final decree upon the original bill (R. 222, Opinion R. 220, reported in 28 Fed. 2nd 885), and had construed the said condition and enjoined an order of the Commission whereby the Commission had required appellee to set up its stock, common and preferred, at this same figure, $9,261,043.87. This decree was not appealed from. The Commission, on December 3rd, 1928, voted not to appeal from it (43rd Annual Report, I. C. C., 108).

ORDERS OF COMMISSION

The orders of the Interstate Commerce Commission involved in this matter, were entered In the Matter of the Reorganization and Control of the Atlanta, Birmingham & Atlantic Railway Company. The first order and the report accompanying same is reported in 117 I. C. C., 181-190 (R. 311). The second order of the Commission was entered on December 21, 1926, 117 I. C. C., 442 (R. 320). The third order was entered April 9, 1928, and is quoted in the original bill at page 10 of the record. (See opinion of Court, R. 222). The fourth order was entered in the same matter

on October 9, 1929, 158 I. C. C., 6-14 (R. 486). The final valuation by the Commission of the properties involved as of June 30, 1914, is found in Valuation Docket No. 1, 75 I. C. C. 645. This valuation is referred to at page 158 of the record.

JURISDICTION

Counter showing was made by the appellee to the appellants' statement as to the basis on which appellants contend that this Court has jurisdiction to review the decree of the District Court. At the same time and on the same grounds appellee, acting under Rule 7, paragraph 4, of the Rules of this Court, moved the Court to affirm the decision of the lower court, for that the questions on which the decision in the cause depends are so unsubstantial as not to need further argument. Further consideration of those motions was postponed by the Court to the hearing of the case on the merits. Those motions are now referred to and it is respectfully requested that the arguments in this brief be applied to them.

CONTENTIONS OF APPELLEE

1

(a) The final decree rendered in the District Court on the original bill (Record 222-223) dated October 26, 1928, enjoining the enforcement of the Commission's order of April 9, 1928 (R. 10), which construed the proviso to the Commission's order of December 21, 1926 (R. 324), was correct. The effect of this decree was to enjoin the said proviso as it was construed by the Commission. Besides, it was *res adjudicata* of the proposition that the stock of the New Company and the offsetting entry in account 701, Investment in Road and

Equipment, should be set up by the New Company on its books upon the basis of the current cash value of the properties formerly owned by the Atlanta, Birmingham and Atlantic Railway Company and its receiver, acquired by the New Company in payment for its shares of stock, common and preferred.

The Commission in its subsequent proceedings acted contrary to that decree.

(b) Said decree was an adjudication that, in the ascertaining of said value, the value as fixed on this property as of June 30, 1914, by the Commission in its Valuation Docket No. 1 (75 I. C. C. 645) under section 19-a of the Interstate Commerce Act should be taken into consideration.

The Commission refused in all of its proceedings in this matter to give that valuation any weight whatsoever.

(c) Said decree amounted to an adjudication that the guarantee by the Atlantic Coast Line Railroad Company of the payment of the dividends on the preferred stock and the retirement value of that stock (in many circumstances in excess of par) is also an element to be taken into consideration in determining the value of those properties.

The Commission refused to give that decree this effect and acted to the contrary.

2

Independently of the said decree of the District Court, the Commission's construction of the proviso to its order of December 21, 1926, made after the parties had acted thereon, should not prevail, for that such construction will make the said order unjust and unreasonable; will give to it, after

acted upon, a meaning and scope not properly attributable to it; will make the order exceed the jurisdiction of the Commission, because it will prescribe the *contents*, rather than the *form*, of the New Company's accounts and records, and will require the New Company to give up its initiative over the contents of its accounts, and will require the keeping of its accounts in a manner which will make them worse than useless in reflecting its condition as to rate making, depreciation, net return on the fair value of its property, recapture of excess earnings, and its credit standing; and as well in exhibiting its affairs to its stockholders and to public bodies. It will also result in requiring the keeping of its books so that evidential value attributed to them by the Act to Regulate Commerce will make them reflect its condition as to all of those matters in a manner incorrect in fact, and unjust to the Company and to all other parties concerned. The action of the Commission ignores the requirement of Section 19a, subsection (i), that the final valuation of railroad properties by the Commission shall be prima facie evidence of the value of the property in all proceedings under the Act to Regulate Commerce.

The Commission's construction of the proviso to its said order of December 21, 1926, is not justified by its words, nor by the facts, nor by the law.

The properties acquired by the New Company in consideration of its stock should be entered on its books at the cash value thereof on the date they were so acquired.

3

(a) The acts of the Commission in its first fixing of the figures at which these properties are to be carried on the

books of the New Company culminating in its order of April 9, 1928 (R. 10), amounted to an order over which the Court had jurisdiction. The first decree so adjudged it and there was no appeal therefrom.

(b) The fourth act of the Commission, October 9, 1929 (R. 480-494), amounted to an order over which the Court had jurisdiction.

4

The appeal should be dismissed on the motions heretofore filed.

5

The finding of the Commission made October 9, 1929 (R. 486), subsequent to the decree of the Court on the original bill was not in accordance with the decree of the Court rendered on October 26, 1928 (R. 223).

6

The decree of the lower court appealed from is correct, and unless the appeal is dismissed that decree should be affirmed.

STATEMENT OF THE CASE

Prior to February 23, 1926, the properties of Atlanta, Birmingham & Atlantic Railway Company, herein sometimes referred to as the Old Company, were in the hands of a receiver appointed by the U. S. District Court for the Northern District of Georgia in suits instituted against it by its creditors and trustees under mortgages executed or assumed by it. The bondholders offered to sell the properties to Atlantic Coast Line Railroad Company, but the offer was

refused (R. 290). Finally, on February 23, 1926, there was executed by representatives of the bondholders and by Atlantic Coast Line Railroad Company the agreement of February 23, 1926, appearing on pages 83-90 of the record.

AGREEMENT OF FEBRUARY 23, 1926

Under this agreement the bondholders of the A. B. & A. Railway Company were to bid at foreclosure sale for the properties of the Old Company and its receiver and if successful were to organize a New Company under the laws of the State of Georgia. The New Company was to have authority to issue non-voting, 5% preferred stock of $100 par value and in an amount sufficient to provide $60 of preferred stock for each $100 of bonds of the Old Company outstanding, and also to issue 150,000 shares of voting no par common stock and was to issue said stock, common and preferred, in acquiring the said properties from the purchasers at foreclosure. The Old Company or its receiver had outstanding obligations shown in Exhibit A to said agreement and then estimated at $3,677,500 (R. 90), but subsequently ascertained to be $4,080,699.80 (R. 487) having priority over the bonds of the Old Company. The Atlantic Coast Line Railroad Company agreed to furnish funds with which to pay such amounts already matured and to provide for the payment, at maturity, of such as were not yet due, and also to guarantee the 5% dividend on the preferred stock and the retirement value thereof which is not less than par value in any circumstances, and in others, $103 per share plus accrued dividends. The bondholders were to convey to the New Company the properties acquired at foreclosure subject only to such of the items included in said Exhibit A as might not, at the time of such conveyance, have been paid because not yet matured (R. 86),

and the New Company was to pay for said properties by issuing to the bondholders all of its stock, common and preferred. The preferred stock, guaranteed as aforesaid, was to be delivered by the Committee to the bondholders in exchange for their bonds, and the entire 150,000 of voting common stock was to be sold by the purchasers to Atlantic Coast Line Railroad Company. (See opinion of Commission, R. 313 and of Court, R. 220, 222).

PLAN AND AGREEMENT OF REORGANIZATION

The agreement of February 23, 1926, was made the basis of the Plan of Reorganization, herein sometimes called the Plan, which was adopted by the bondholders, and appears on page 91-111 of the record. This Plan was adopted for the purpose of making the agreement effective (R. 97).

APPLICATIONS TO THE COMMISSION FINANCE DOCKETS 5454 AND 5470

Pursuant to the plan and agreement of reorganization, the bondholders committee filed with the Interstate Commerce Commission its application on behalf of the company to be organized, "pursuant to said plan and agreement of reorganization dated February 23, 1926" (which plan was recited in the application), for the purpose of securing the approval by the Commission of the acquisition and operation by the New Company of the lines of railroad of the A. B. & A. Railway Company and for authority for the issuance by the New Company of preferred stock and common stock in accordance with the Plan (R. 224). In this application it was stated that,

> "Fifth. The purposes and uses of the proposed issue of capital stock are to acquire the lines of railroad and

other properties of the Old Company and its Receiver, as aforesaid, and to carry out the plan." (R. 224).

Subsequent to the filing of the application on behalf of the New Company just above mentioned, Atlantic Coast Line Railroad Company, on April 12, 1926, filed with the Interstate Commerce Commission its application for authority in accordance with the plan to execute the guaranty of the preferred stock of the New Company and to acquire control of the New Company by the acquisition from the bondholders of the entire issue of common stock of the New Company. This application was given Finance Docket No. 5470 (R. 448).

Pursuant to the requirements of the Interstate Commerce Commission the bondholders filed the return to questionnaire, appearing on page 258 of the record. In that return the following statement appears, among others:

> "The reorganization committee, or its nominee, will hold control over the applicant until the consummation of the plan, at which time control will be transferred to Atlantic Coast Line Railroad Company. Control will be in the form of the entire outstanding common stock." (R. 260).

FORECLOSURE SALE

On June 22, 1926, the Special Master offered for sale the properties of the old A. B. & A. Railway Company. At that sale the properties were purchased by the purchasing committee of the bondholders of the old A. B. & A. (R. 134). The bid of such purchasers was conditioned on the making by the Interstate Commerce Commission of orders conferring authority substantially sufficient to enable the parties to carry out the plan and agreement of reorganization (R. 138 and

314). The petition of the purchasers for confirmation of the sale, showing these facts, is set out on page 130 of the record and the Special Master's report of sale appears on page 135 of the record.

FIRST ORDER OF THE COMMISSION

Under date of October 26, 1926, the Interstate Commerce Commission entered its first report and order (R. 311). By this report and order the Commission approved the agreement of February 23, 1926, and the plan of reorganization, authorized the acquisition by the Atlantic Coast Line of control of the New Company to be organized and stated:

> "There is no difficulty in reaching the conclusion that from the standpoint of transportation service the proposed reorganization and control by the Atlantic Coast Line is in the public interest. The sentiment in favor of the plan in the territory served by the A. B. & A. is apparently unanimous and earnest. Approval should therefore be given and the necessary authority issued, unless there be something in the terms and conditions of the proposed acquisition, or in the consideration, so inequitable as to require modification in the public interest. We find nothing of this character in the arrangement. It is true that there is wide disparity between the proposed price to be paid by the Atlantic Coast Line for its control of the property and the value of the property viewed as a basis for rate making, but our highest court has distinguished between value for rate-making purposes and exchange value. Galveston Electric Company v. Galveston, 258 U. S., 388." (R. 316-17).

The Commission held:

> "The new company has not been incorporated. We are advised by counsel for the applicants that incorpora-

tion under the laws of the State of Georgia is considered desirable, but under those statutes no charter may be issued to purchasers taking over property under foreclosure sale until a master's deed has been executed. To meet this desire, action upon the application of the new company for authority to issue securities and upon the application of the Atlantic Coast Line for authority to assume obligation with respect to such securities will be deferred. Upon receipt of proof of incorporation of the new company, accompanied by a copy of its charter, we will dispose of the remaining applications by supplementary report and order." (R. 318).

ORGANIZATION OF A. B. & C. R. R. CO.

Pursuant to this authority by the Commission, the sale of the properties of the old A. B. & A. and its receiver to the bondholders committee was unconditionally approved by the order of the United States District Court entered November 16, 1926, and those properties of the old A. B. & A. were on that day conveyed to the bondholders purchasing committee (R. 234). Thereupon, the said purchasers, Geo. E. Roosevelt and J. A. Fowler, filed application with the Secretary of State of the State of Georgia, asking for a charter for the new company to be organized in accordance with the plan and to acquire the properties purchased by said committee at foreclosure (R. 231). The charter was issued by the Secretary of State on November 22, 1926 (R. 241-3). By this charter the new company was given authority, inter-alia,

"for the issue of all or any of said fifty-two thousand shares of preferred and/or said one hundred and fifty thousand shares of common stock for the purpose of acquiring and paying for the property and assets described in article first hereof and for the purpose of carrying

out the above-mentioned plan and agreement of reorganization dated February 23, 1926." (R. 240).

Pursuant to this charter, the New Company was organized and was authorized to issue $5,180,344.07 par value of preferred stock and 150,000 shares, without par value, of common stock, and the officers of the New Company were authorized to cause to be done such acts or things as were necessary to carry out and observe the agreement of February 23, 1926, and the plan of reorganization (R. 246-7). The New Company then joined in and adopted the application then pending before the Commission (R. 289).

SECOND ORDER OF THE COMMISSION AND CONDITION INVOLVED IN THIS CASE

Without further hearing the Interstate Commerce Commission, after consideration of the foregoing, made its second report and order (R. 320) under date of December 21, 1926, and authorized the issuance by the New Company of $5,180,344.07 of preferred stock and the 150,000 shares of no par common stock and also authorized the guaranty by the Atlantic Coast Line Railroad Company of the dividends on the preferred stock and the retirement value thereof in accordance with the plan. The authority of the Commission to the New Company for the issuance of its stock was made subject to condition as follows:

> "Provided, however, and authority to issue said stock is granted upon the express condition that, for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text of account 41, 'Cost of road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in

excess of its par value; *and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor.*" (R. 324). (Italics added).

Account 41, referred to in this condition, is shown on page 435 of the record. It provides:

> " . . . Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis . . . "

The construction of this condition, and its application to the facts herein, was the actual and controlling issue in the original case. Its construction and application were settled in the first decree. The settlement is not recognized by the appellants.

CONSUMMATION OF THE PLAN

Pursuant to the authority of the Commission given by the two orders of October 26th and December 21st, 1926, the sale was consummated to the New Company in consideration of its two classes of stock on January 4, 1927 (as of January 1, 1927).

SUBSEQUENT ACTION BY THE COMMISSION LEADING UP TO ITS THIRD ORDER

The New Company employed Haskins & Sells, Certified Public Accountants, to assist it in preparing its balance sheet and opening its books. On June 7, 1927, Haskins & Sells submitted a tentative balance sheet as of January 1, 1927, with their letter which appears on page 296 of the record. The balance sheet so submitted (R. 298) was prepared after consideration of the condition in the order of the Commission

of December 21, 1926, and was based on the value of the property received by appellee in exchange for its stock.

This balance sheet was submitted to the Commission and on August 3, 1927, the Commission, through letter of Dr. Wylie, its Director of the Bureau of Accounts, directed appellee to reduce its entry in "Investment in Road and Equipment" (Account 701) by $22,390,985.21, or from $29,471,859.00 to $7,080,873.79 (R. 300, 16).

The reckoning of the preferred stock at par, or $5,180,344.07, was not objected to. Dr. Wylie determined that the common stock must be set up at $4,080,699.80, the amount paid by the Coast Line for debts of the Old Company, or its receiver. From this he deducted the $1,918,117.46 of accrued depreciation, leaving $2,162,582.34. He then deducted this amount from the $24,553,567.55 shown against the common stock, leaving $22,390,985.21, which is the amount by which he says the "Road and Equipment" total of $29,471,859.00 must be reduced, leaving $7,080,873.79 to represent the property acquired by appellee, a part of which property had been valued as of June 30, 1914, by the Commission, at $23,242,107.00 (R. 158-60).

THIRD ORDER OF THE COMMISSION. ENJOINED BY FIRST DECREE

Appellee, upon receipt of this letter, filed with the Commission its supplemental application (R. 289) and the Statement of Facts (R. 325) showing that under the plan as approved and carried out, the New Company, appellee, did not and could not receive any part of the $4,080,699.80; that it received for its stock, common and preferred, the property of the Old Company, A. B. & A. Railway Company, that the

condition in terms referred to the "amount received" by the appellee for the stock and that the requirement in the letter from Dr. Wylie, above referred to, was contrary to the facts and based on a misconstruction or total disregard of the terms of the proviso of the order of December 21, 1926. Appellee asked that the Commission overrule Dr. Wylie and permit it to show, on its books, as the amount received for its common stock, the value of the property of the Old Company, less the par of the $5,180,344.07 of preferred stock (R. 294-5). It was the property which was "received" for its said shares of stock.

Without a hearing the Commission, by its order of April 9, 1928, denied the application (R. 10).

FIRST DECREE OF DISTRICT COURT

Thereupon, appellee filed in the United States District Court for the northern District of Georgia its bill (R. 1). The Interstate Commerce Commission and the United States answered (R. 19 and 23). After hearing, the said Court rendered its opinion (R. 220) and entered its decree of October 26, 1928 (R. 222). In its opinion, after stating the facts, the Court said:

> "Two methods of valuing the common stock are contended for, one, that it was worth the value of the roads acquired, less the value represented by the preferred stock; the other that it was worth what the Coast Line Company paid for it in cash, $4,080,000. The requirement of the order of December 21st, 1926, that the common stock must be reckoned 'on a basis not in excess of the amount received therefor' comes to the same thing as the requirement of rule 41, and meets the same divergent constructions. It can not be said with accuracy

that the money paid by the Coast Line Company was received by the Coast Company for its stock. The Coast Company received for the stock the deed of the bondholders' representatives covering the railroads, and they in turn sold the common stock to the Coast Line Company, and for a consideration not only of $4,080,000 actually paid, but also of heavy guaranties of dividends on the preferred stock over and above its par already allowed in this valuation." (R. 221).

The Court also found that the entry in the account as to "Investment in Road and Equipment"—Account 701—"*should be fixed on a basis of the fair cash value of the property acquired by the Coast Company in exchange for its stock as of the date of its acquisition.*" (R. 221). (Italics added).

It then decreed:

"*that the equities are with the complainant* and that the order of April 9th, 1928, complained of, in so far as the same fixed the amount at which the complainant is to return its capital stock and its investment in road and equipment, be set aside and all persons interested in the enforcement of said order, and their officers and agents, are permanently enjoined from enforcing the same, and that the supplemental application of the complainant in which said order was entered by the Interstate Commerce Commission stand for further hearing before said Commission." (R. 223). (Italics added).

FOURTH ORDER OF THE COMMISSION ENJOINED BY THE DECREE APPEALED FROM

The Commission voted not to appeal from this decree (43rd Annual Report, I. C. C., 108) and set the case for further hearing before its Examiner (R. 204). At this hearing Witness Bugg, for appellee, identified the property ac-

quired by it as that valued by the Commission in 75 I. C. C. 1, and showed that the value so found, plus net additions and betterments to January 1, 1927, amounted to $25,744,863.86 (R. 207 and 158).

The Examiner of the Commission, who presided at the hearing, filed a Report Proposed (R. 467) and concluded:

> "The Commission's report of valuation of the railroad properties operated by the Atlanta, Birmingham & Atlantic, as reported in 75 I. C. C. 645, endeavored to make it plain that its valuation *had no relation to the worth of the properties*, but was merely a sum upon which the carrier was entitled to earn a fair return . . . "
>
> "The Commission should find that the carrier may include in its balance sheet statement in investment in road and equipment as of January 1, 1927, an amount not exceeding $9,261,043.87." (R. 473). (Italics added).

Appellee filed Exceptions to this Proposed Report (R. 473) and showed that the Examiner had not given to the decree of the District Court "the conclusive effect that must under the law be accorded" to it (R. 474-5); had disregarded the meaning of the condition, as fixed by the Court, and had recommended that the Commission require the setting up by appellee on its books of the identical figure, use of which the Court had enjoined (R. 474).

Argument of these exceptions was had before the Commission and on October 9, 1929, the Commission made its fourth report (R. 486). The headnote of this report is as follows:

> "Upon further hearing, application of commission's accounting regulations to statement of the investment

accounts of the Atlanta, Birmingham & Coast Railroad Company as of January 1, 1927, considered and *accounting prescribed.*" (Italics ours.)

The concluding paragraph of the report is as follows:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. *The Company will be expected to adjust its accounts in accordance with this finding within 60 days from the service of this report.*" (R. 494). (Italics ours).

This, again, is the identical figure use of which had been enjoined by the Court by its decree of October 26, 1928 (R. 222). The only supplemental evidence in the record was that of Witnesses Bugg and Greene at the February, 1929, hearing, who identified the property acquired by appellee as that valued by the Commission as of June 30, 1914, in 75 I. C. C. 1, plus additions and betterments (R. 206-10) on which basis, as shown by Exhibit A filed by Witness Bugg, the property acquired by appellee in exchange for its stock was worth at least $24,481,893.86 (R. 160).

With respect to this valuation, the Commission said in its report:

> "Counsel for the New Company also contend that paragraph (i) of section 19a requires that the value found under that section be treated as prima facie evidence of value to be included in the investment accounts of the New Company; *but we do not regard that value as pertinent or material evidence in the determination of investment as that term is used in our accounting regulations.*" (R. 494). (Italics added).

Compare this with the Court's opinion of October 26, 1928, as follows:

> "The words of the order of December 21st, 1926, were acted upon by the parties and should have their fair operation. *We think they required that the valuation of the stock and the offsetting entries as to the investment in road and equipment should be fixed on a basis of the fair cash value of the property acquired by the Coast Company in exchange for its stock as of the date of its acquisition by it.*" (R. 221). (Italics added).

Again the Commission in its report stated:

> "The proviso in the order of December 21, 1926, previously quoted, was an application of the accounting orders to these transactions. *The consideration given by the New Company, considered as a separate entity, was in the form of stock, preferred and common.* In setting up the value of the preferred stock we required that it be reckoned on a basis not in excess of its par value which was $5,180,344.07; and the order further provided that the cash value of 150,000 shares of no-par common stock issued to the Atlantic Coast Line must be reckoned on a basis not in excess of the 'amount received therefor.' As already stated this amount has since been found to be $4,080,699.80." (R. 491). (Italics added).

The Court's decree of October 26, 1928, was directly to the contrary. The Commission appears to have been dealing with the Court's decree as though it was not binding upon it.

STRATEGIC LOCATION OF THE RAILROAD INVOLVED

The lines now owned by the Atlanta, Birmingham & Coast Railroad Company were allotted by the Commission to the

Atlantic Coast Line and Louisville & Nashville system in its tentative plan of consolidation of railroads, which was promulgated August 3, 1921. (63 I. C. C. 455-460). It was retained in that group in the final plan. (159 I. C. C. 522-534).

At page 542 the Commission, describing the Atlantic Coast Line-Louisville & Nashville system, said:

> "At one point, however, it is markedly weak, due probably to the independent evolution of its two great wings—eastern and western. This defect is a lack of connection affording through routes between the North and South across the whole of middle Georgia between Atlanta and Waycross. The first point concerning its recreation is the bridging of this gap."

The Commission then notes the location of the Atlanta, Birmingham & Atlantic Railway and its relation to those two roads, saying (p. 543):

> "Despite its history, a very considerable value attaches to the Atlanta, Birmingham & Atlantic Railway. This arises from its relation to the larger systems round about, particularly the Atlantic Coast Line and Louisville & Nashville."

SECOND DECREE OF COURT APPEALED FROM

After the service of this report (R. 500) appellee filed in the District Court its supplemental bill (R. 480). That Court, after answer by the United States and the Commission (R. 498 and 495) entered its opinion and decree of January 18, 1930.

In its opinion the Court found:

> "The concluding words 'Provided, however, and authority to issue said stock is granted upon the express

condition that . . . the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor,' can mean only the amount received by the Coast Company for its stock, and not what was paid by the Coast Line Company to the bondholders committee for it. *The Coast Company received, and was, under the reorganization plan, to receive not a dime of money, but only a deed to the railroads. So far as it was concerned it paid no cash for the deed, but only its stock.* The commission's accounting regulation No. 41, referred to expressly in the order of December 21st, 1926, requires 'where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis.' The stock which constituted the consideration for the roads must, therefore, be valued on a cash basis. Because it represented on January 1st, 1927, nothing except the railroads purchased, it can be valued only by valuing them. So that the requirement of the regulation and of the condition in the order come practically to the same thing, each necessitating a valuation of the railroads as of January 1st, 1927. Notwithstanding the close connection between the Coast Line Company and the new Coast Company, they are separate corporations. The New Company is but beginning its career. Its stockholders may change and creditors having separate interests may arise. Separate corporate organization can sometimes be disregarded in order to defeat fraud or reach the true rights of stockholders and creditors, but the separate accounting of railroads under the interstate commerce act presents no such case. This separately organized railroad enterprise is entitled to have its separate and independent accounts under the usual regulations, and this was plainly indicated by the order of December 21st, 1926. *The entry here in question may hereafter constitute admissible evidence in fixing rates, recapture of profits, ascertainment of deprecia-*

tion, assessment of advalorem taxes and the like. The purchase of the railroads by the Coast Company with its stock was its own transaction. It was unaffected (save that the foreclosure sale was held up until the Coast Line Company should fully pay its assumptions to the bondholders committee) whether those assumptions had turned out to be $3,677,500.00, as was first supposed, or $4,080,697.00 as turned out to be true, or $10,000,000.00 as might have happened. In any case the cash value of the railroads diminished by the undisputed value of the preferred stock represents the investment of the common stock under accounting regulations No. 41 and under the terms of the enabling order of December 21st, 1926. The cash payments by the Coast Line Company in acquiring the common stock from the bondholders committee did not necessarily measure its value, nor did they make the purchase by the Coast Company of the railroads a cash transaction so as to put into operation the provisions of regulation No. 41 touching cash purchases. It is true that regulation seeks to have recorded the historical fact of the amount invested rather than the value of the investment. The necessary exception recognized in the regulation does exist when, as here, the purchasing company does not pay cash. The Coast Line Company's purchase of the stock has this much to do with it: It is a voluntary cash transaction occurring at the critical time and having a close relationship to the value of the railroads, inasmuch as it expresses their value as estimated by the bondholders committee and the Coast Line Company. It is evidence, but not the exclusive nor conclusive evidence of the then actual cash value of the railroads." (R. 501-2).

By its decree, the Court adjudged:

"That the equities are with the complainant, and that the order of October 29th, 1929, of the Interstate Commerce Commission herein complained of, in so far as the

same fixes the amount at which the complainant is to return its capital stock and its investment in road and equipment, be set aside and that the persons interested in the enforcement of said order, and their officers and agents, are permanently enjoined from enforcing the same, and that the supplemental application of the complainant on which said order was entered by the Interstate Commerce Commission stand for further hearing before said commission."

From that decree the United States and the Commission have appealed (R. 504).

In the Appendix there are set out copies of Section 20 (7) of the Act and of Account 41 from the Classification of Investment in Road and Equipment of Steam Roads, with the note thereto (R. 435).

PART TWO

BRIEF OF THE LAW

SUMMARY

I. (a) The final decree of the United States District Court for the Northern District of Georgia, dated October 26, 1928, on the original bill (R. 222-223) was an adjudication of the issues involved in this case.

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Herman on Estoppel and Res Judicata, p. 548, §457; Vol. 1, p. 118;
Grubb vs. Public Utilities Commission, 281 U. S. 470;
Baltimore Steamship Co. vs. Phillips, 274 U. S. 316, 319;
United States vs. California & Oregon Land Co., 192 U. S. 355;
United States vs. Moser, 266 U. S. 236, 241;
Cromwell vs. County of Sac, 94 U. S. 351-2-3;
Himely vs. Rose, 5 Cranch 313, 316;
Central Trust Co. of New York vs. Western North Carolina Railroad Co., 89 Fed. 24, 27, 28;
Pentlarge vs. Pentlarge, 22 Fed. 412;
City of Omaha vs. Omaha Electric Lt. & Power Co., 255 Fed. 801, 802 (C. C. A.);
Vanwert vs. Boyes, 140 Ill. 89 (29 N. E. 710);
Root vs. Woolworth, 150 U. S. 401, 410, 411;
Osage Oil Co. vs. Continental Oil Co., 34 Fed. (2d) 585;
International Ry. Co. vs. Prendergast, 29 Fed. (2d) 296.

(b) The decree rendered on October 26, 1928, was a final decree.

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1st Black on Judgments, §21, p. 31;
Colorado Eastern Ry. Co. vs. Union Pacific Ry. Co., 94 Fed. 312 (C. C. A.);

McGourkey vs. Toledo & Ohio Ry., 146 U. S. 536;
St. Louis Iron Mountain & Southern Railroad Co. vs. Southern Express Co., 108 U. S. 24, 29;
Lewisburg Bank vs. Sheffey, 140 U. S. 445;
Beebe vs. Russell, 19 Howard 283;
Forgay vs. Conrad, 6 Howard 201;
Thomson vs. Dean, 7 Wall. 342;
French vs. Shoemaker, 12 Wall. 86.

II. The action of the Commission constituted an order over which the Court has jurisdiction.

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Commerce Court Act of June 18, 1910;
Urgent Deficiencies Act of Oct. 22, 1913;
U. S. Code, Title 28, §41 (28);
U. S. & I. C. C. vs. New River Co., 265 U. S. 533;
New York Railway Co. vs. U. S., 14 Fed. (2d) 850;
Chicago Junction Case, 264 U. S. 258, 264;
U. S. vs. Illinois Central R. R., 244 U. S. 82;
Proctor & Gamble Co. vs. U. S., 225 U. S. 282;
Piedmont & Northern Ry. Co. vs. U. S., 280 U. S. 469;
Act to Regulate Commerce, §20 (7);
Sillman vs. Spokane Savings & Loan Society, 175 Pac. 296 (Wash.).

III. The construction which the Commission gives to the proviso to its order of December 21, 1926, brings it in conflict with paragraph (i) of Section 19a of the Interstate Commerce Act.

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Interstate Commerce Act, §19a, ¶ (i);
St. Louis & O'Fallon R. Co. vs. United States, 279 U. S. 461, 484;
U. S. vs. I. C. C., 252 U. S. 178, 187.

IV. The Commission's construction of the proviso to its order of December 21, 1926 (R. 324), if allowed to

become effective, will work great hardship and bring about many inconsistencies.

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Act to Regulate Commerce, §20 (5); §15a (3) (6);
Smyth vs. Ames, 169 U. S. 466, 547;
Minnesota Rate Cases, 230 U. S. 352;
Willcox vs. Consolidated Gas Co., 212 U. S. 19, 41;
St. Louis & O'Fallon Ry. Co. case, 279 U. S. 461;
Kansas City Southern Ry. Co. vs. U. S., 231 U. S. 423, 440.

V. The case of Passaic Consolidated Water Company vs. Board of Public Utility Commissioners (5 N. J. Misc. 1078), 104 N. J. 666, is especially apposite to the case at bar.

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Kansas City Southern Ry. vs. U. S., 231 U. S. 423, 449.

VI. Some of the things for which a system of accounts of a railroad company should be useful and as to which the accounts of the appellee would be rendered worse than useless if the Commission's construction of the proviso to its order of December 21, 1926, holds. Some of those things are the use of the accounts in the ascertainment of fair return, the evidential value of books, recapture of earnings, credit standing, property investment, and depreciation.

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Interstate Commerce Act, §15a, (2) (4) (6); §19a; §20, (5) (7);
United Railways vs. West, 280 U. S. 234, 254;
Kansas City Southern Ry. case, 231 U. S. 449.

VII. The construction which the Commission places on the proviso to its order of December 21, 1926, would make that order to exceed its jurisdiction.

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Interstate Commerce Act, §20a, (5);
Hepburn Act of June 29, 1906, 39 Stat. L. 594, §7;
U. S. vs. N. C. & St. L. Ry., 217 Fed. 254, 263, 264.
U. S. vs. Chicago, etc., R. R. Co., decided Jan. 5, 1931.

VIII. Meaning of the expression "terms and conditions" as used in Section 20a, sub-division 3 of the Act to Regulate Commerce.

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Act to Regulate Commerce, §20a, (3);

Robinson vs. B. & O. R. R. Co., 222 U. S. 506-512;

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426-448;

Lewis, Sutherland Statutory Construction, 2nd Ed., Vol. 2, p. 847, §§443 and 448, and authorities cited;

Bankers Trust Co. vs. Bowers, 21 A. L. R. 922 (292 Fed. 793, C. C. A.), 25 R. C. L. 1022; 1008 §247;

U. S. vs. Landram, 118 U. S. 81, 85;

I. C. C. vs. Chicago Great Western Ry., 209 U. S. 108, 119;

Great Northern Ry. vs. Minnesota, 238 U. S. 340, 346;

Southwestern Bell Telephone Co. vs. Commission, 262 U. S. 276, 289;

Terral vs. Burke Construction Co., 257 U. S. 529, 532;

Frost Trucking Co. vs. Commission, 271 U. S. 583, 593;

Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494, 507;

Adair vs. United States, 208 U. S. 161, 180;

Western Union vs. Kansas, 216 U. S. 1, 47;

C. B. & Q. R. R. vs. Osborne, 265 U. S. 14, 16.

I

(a) THE FINAL DECREE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, DATED OCTOBER 26, 1928, ON THE ORIGINAL BILL (R. 222-223) WAS AN ADJUDICATION OF THE ISSUES INVOLVED IN THIS CASE

The final decree on the original bill

> "decreed that the equities are with the complainant and that the order of April 9, 1928, complained of, in so far as the same fixed the amount at which the complainant is to return its capital stock and its investment in road and equipment, be set aside and all persons interested in the enforcement of said order, and their officers and agents, are permanently enjoined from enforcing the same, and that the supplemental application of the complainant in which said order was entered by the Interstate Commerce Commission stand for further hearing before said commission."

The controlling questions are:

(1) Did this decree amount to an adjudication of the issues presented in the supplemental bill?

(2) If that be not so, then what is the correct meaning and application of the proviso to the Commission's order of December 21, 1926? (R. 324).

This decree adjudged that:

1. The properties now owned by the appellee were sold at foreclosure sale to representatives of the bondholders of the companies previously owning those properties, who proposed to organize a corporation, the Coast Company, to take

over and operate them. (The court refers to the appellee as the Coast Company.)

2. The New Company (the appellee) was to issue, in payment for those properties, $5,180,000 of preferred stock and 150,000 shares of common stock without par value. (The court states the amount of the preferred stock in round figures; the actual amount is $5,180,344.07.)

3. The preferred stock was to be used to pay the bondholders' claims and the common stock was to be sold to the Atlantic Coast Line Railroad Company in consideration of its guaranty of the principal and dividends of the preferred stock and of its payment, or assumption, of accumulated losses in operation, taxes, and receivership and reorganization expenses, amounting, as it turned out, to $4,080,699.80.

4. Proceedings before the Commission were instituted to obtain leave to operate the roads and to issue the stock, and by separate proceedings the Atlantic Coast Line sought authority to acquire the common stock on the terms above set forth. These proceedings were consolidated and by two successive orders the authorities sought were granted.

5. The representatives of the bondholders deeded the railroads to the New Company in consideration of its entire stock issues and disposed of the preferred stock to the bondholders and of the common stock to the New Company, as proposed.

6. The Commission's order of December 21, 1926, imposed a condition as follows (R. 220):

> "Provided, however, and authority to issue said stock is granted upon the express condition, that for the purpose of accounting, as provided in the classification of

investment in road and equipment in the text of Account 41, 'Cost of road purchased,' the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor."

7. The New Company undertook, in August, 1927, to comply with this provision. "It proposed, since its entire stock was exchanged for the railroads, to treat them as worth thirty million dollars, in round figures, on the basis of the valuation of the railroads as of 1914, made by the Commission itself, under section 19a of the commerce act." Its proposal was rejected and the Commission insisted upon a valuation of $9,260,000. The New Company then made a supplemental application to the Commission, asking for a hearing and for a construction of the proviso in the order of December 21, 1926, and for leave to use the figures and basis first proposed. Without a hearing the application was denied on April 9, 1928.

8. The consideration paid by the New Company for the property was its "stock, preferred and common."

9. The requirement of the order of December 21, 1926, that the common stock must be reckoned "on a basis not in excess of the amount received therefor" comes to the same thing as the requirement of Rule 41.

10. It can not be said with accuracy that the money paid by the Atlantic Coast Line Railroad Company was received by the New Company, the appellee, for its stock. The New Company received for its stock "the deed of the bondholders' representatives covering the railroads and they in turn sold

the common stock to the Coast Line Company for a consideration not only of $4,080,000 actually paid, but also of heavy guaranties of dividends on the preferred stock over and above its par already allowed in this valuation." The court might also have added that the guaranty was not only of dividends but of the retirement value, which is in excess of par in some instances and never less than par.

11. The words of the order of December 21, 1926, were acted on by the parties and should have their fair operation. These words in the condition required "that the valuation of the stock and the offsetting entries as to the investment in road and equipment should be fixed on a basis of the fair cash value of the property acquired by the Coast Company in exchange for its stock as of the date of its acquisition by it."

12. The action of the Commission constituted an order over which the court had jurisdiction.

All of the above mentioned findings of the court were covered by issues made by the bill (R. 1) and the answer of the Interstate Commerce Commission (R. 19) and of the United States (R. 23).

A judgment of the court in a case covers not only the points on which the court was actually required to form an opinion and pronounce judgment, but also every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. It applies to every objection urged in a second suit, when the objection was open to the party in the legitimate scope of the pleadings of the former one and might have been presented in it.

Herman on Estoppel and Res Judicata, p. 548, §457.

This principle is very clearly stated in Grubb vs. Public Utilities Commission, 281 U. S. 470, rendered on the 19th of May, 1930. That case was based upon the order of the Ohio Commission granting a certificate to certain motor bus carriers, but excluding therefrom the loop at Portsmouth. The case was judicially reviewed by the Supreme Court of Ohio and that review had culminated in a judgment. Application was then made to the Commission for rehearing and was denied. A bill was then filed in the United States District Court. That court held that the Commission's order had been adjudged valid and the appellant was barred and estopped by that adjudication from further litigating the same matter. The court held (pp. 478-80):

> "The thing presented for adjudication in the case in the State court was the validity of the order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge. He was not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds, and reserving others for another suit, if failing in that. * * * As the ground just described was available but not put forward, the appellant must abide the rule that a judgment upon the merits in one suit is res judicata in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end."

To the same effect see:

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316, 319;

United States vs. California & Oregon Land Co., 192 U. S. 355;
United States vs. Moser, 266 U. S. 236, 241.

It is recognized that

> "There is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. * * * If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. * * * But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered."

Cromwell vs. County of Sac, 94 U. S. 351-2-3.

In the case at bar the second case was upon the same claim or demand as that asserted as involved in the first; but whether this be true or not, the same matters were put in issue and the same points were controverted in both cases.

A judgment of a court which has become final in a controversy is the law of the case as between those parties in the progress of the trial of the same case.

See Herman on Estoppel and Res Judicata, Vol. 1, p. 118.

The original decree having become final, the case should have thereafter proceeded before the Commission in accordance therewith, and when it came back to the court on the supplemental bill the only question should have been whether its original decree had been executed according to its true intent and meaning.

Himely vs. Rose, 5 Cranch 313, 316.

It was proper to have undertaken to enforce the original decree by a supplemental bill, and the issues which had been adjudged in the original litigation thereby became res judicata, and on such issues there could be no further litigation between the parties and their privies.

Central Trust Co. of New York vs. Western North Carolina Railroad Co., 89 Fed. 24, 27, 28;
Pentlarge vs. Pentlarge, 22 Fed. 412;
City of Omaha vs. Omaha Electric Light & Power Co., 255 Fed. 801, 802 (C. C. A.);
Vanwert vs. Boyes (29 N. E. 710), 140 Ill. 89;
Osage Oil Co. vs. Continental Oil Co., 34 Fed. (2d) 585;
International Railway Co. vs. Prendergast, 29 Fed. (2d) 296.

The supplemental bill in this case was filed between the same parties in aid of the decree in the original suit and to carry out and give effect to that decree. (Root vs. Woolworth, 150 U. S. 401, 410, 411.)

It would seem that, on the most ordinary principles, the decree on the original bill was an adjudication that the proviso of the Commission's order of December 21, 1926, should be construed to require that the New Company should set up its Account 701, "Investment in Road and Equipment," on the basis of cash value of those properties, and as well an adjudication of every fact which was, or might have been, put in issue in reference to the construction and application of said proviso.

(b) THE DECREE ON THE ORIGINAL BILL WAS FINAL

We have seen that the decree on the original bill finally disposed of the case then before the court. It purported to be a final decree. It was rendered on final hearing. It directed the Commission to hear and determine the supplementary petition which had been filed, and in effect directed the Commission to determine the supplementary petition upon the basis of the current cash value of the property acquired by the New Company.

WHEN IS A DECREE FINAL?

> "A final decree means not a final determination of the rights of the parties with reference to the subject matter of the litigation, but merely of their rights with reference to the particular suit."
>
> 1st Black on Judgments, §21, p. 31.
>
> "It is not essential that the judgment be a bar to another suit."
>
> Colorado Eastern Ry. Co. vs. Union Pacific Ry. Co., 94 Fed. 312 (C. C. A.).
>
> "If a court make a decree fixing the rights and liabilities of the parties and thereupon refer the case to a

master *for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final;* but if it refer the case to him as a subordinate court, and for a judicial purpose, the decree is not final." (Italics added).

McGourkey vs. Toledo & Ohio Ry., 146 U. S. 536.

When the court enjoined the order of the Commission, its jurisdiction over the subject was at an end and its decree final.

The controversy in the original suit concerned the right of the New Company to have its road and equipment set up on its books on the basis of the value of the property acquired by it and that controversy was decided in its favor. The controversy under the supplemental bill is the same. The supplemental bill became necessary because the Commission failed to abide the decree of the court on the original bill. This makes a case very similar to St. Louis Iron Mountain & Southern Railroad Co. vs. Southern Express Co., 108 U. S. 24, 29. In that case the controversy was over the right of the Express Company to require the Railroad Company to do the Express Company's business upon the payment of lawful charges. In effect the decree required the Railroad Company to carry for reasonable rates and fix for the time being the maximum of what would be reasonable. The court held that the decree was final.

"A decree which determines the whole controversy between the parties, leaving nothing to be done except to carry it into execution, is a final decree for the purpose of appeal; and none the less so that the court retains the fund in controversy for distributing it as decreed."

Lewisburg Bank vs. Sheffey, 140 U. S. 445.

After the court's judgment the Commission was under the duty to have applied that decree in an administrative way. The Interstate Commission is an independent body with no judicial power; it can do only that which is legislative or administrative. The court had no jurisdiction over the Commission's decision on appeal or exception.

Cases of interest on the subject of a final decree will be found in

Beebe vs. Russell, 19 Howard 283;
Forgay vs. Conrad, 6 Howard 201;
Thomson vs. Dean, 7 Wall. 342;
French vs. Shoemaker, 12 Wall. 86.

The Commission after the original decree had a hearing on the supplementary petition and made a report and issued (October 9, 1929) what the appellee claims was an order (R. 493). The Commission's said report and order completely ignored the fact that the court had adjudged that under the language of the condition of the Commission's order of December 21, 1926, the basis of the entries in controversy should be the value of the property received by the New Company. Its last report, in effect, simply reiterated its original position. It held that the value of the property was neither pertinent nor material evidence (R. 494), thus making its report in complete conflict with the decree and as well with the requirements of Section 19a of the Interstate Commerce Act. The report of the Commission shows quite clearly that the Commission was conscious that it was not proceeding in accordance with the Court's decree, for it argues that the Court was in error. Note Record pp. 489, 493.

We respectfully submit that the decree of the lower court on the supplemental bill should be affirmed, for that the issues were adjudged in the original decree which was final and which was not appealed from.

If the cause is not so determined, we then state that the correct meaning and application of the proviso to the Commission's order of December 21, 1926, requires an affirmance of the Court's decree which is appealed from. This involves a discussion of the several subjects which follow.

II

THE ACTION OF THE COMMISSION CONSTITUTED AN ORDER OVER WHICH THE COURT HAS JURISDICTION

The Government contended in its answer to the original bill that the actions of the Commission up to the date of the filing of that petition (June 14, 1928) (R. 18) did not constitute an order within the meaning of the Commerce Court Act of June 18, 1910, and the Urgent Deficiencies Act of October 22, 1913 (R. 23). The Commission made the same point (R. 21). The court below in its original decree and the opinion accompanying it held that the Commission's acts had constituted an order "over which this court has jurisdiction under U. S. Code, Title 28, §41 (28)." (R. 222).

In the proceedings in the supplemental bill the Government again made the same point (R. 498). The court again found that the action of the Commission was "to be treated as an order, disobedience of which could be punished and may be reviewed in this court for the reason stated in our former opinion." (R. 500).

It is recognized that the District Court has no jurisdiction, under Title 28, Section 41, sub-section 28, U. S. Code Annotated, of an order of the Commission unless that order requires the carrier to do an affirmative act. The final action of the Commission had on October 9, 1929, after the first opinion of the court (R. 486-494), was in the form of a report. It must not be overlooked that this was not the first action of the Commission on this general subject. The first was October 26, 1926 (R. 311-319). That was a report and a certificate of the present and future convenience and necessity and also an order as to the filing of rate schedules. The second action was on December 21, 1926 (R. 320-324). There the Commission issued its order authorizing the New Company to issue not exceeding $5,180,344.07 of its preferred capital stock and not exceeding 150,000 shares of its common capital stock, with the proviso that "the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor."

The next proceeding before the Commission was the effort of the New Company to comply with that proviso by filing its balance sheet showing its investment in road and equipment, based upon the value of the property acquired by it. Then followed the rejection of that balance sheet by the Commission, acting through its director of accounts (R. 16), which action not only rejected the balance sheet but directed the filing of another to conform to the direction.

The next action was the supplemental application to the Commission by the Atlanta, Birmingham & Coast Railroad Company for a construction of the proviso contained in its order of December 21, 1926, and for authority to set up as the book value of the common stock the value of the property

received by it therefor (R. 289-295); and the order of the Commission, without hearing, dated April 9, 1928, which after the preamble is as follows (R. 10):

> "It is ordered that said petition be and it is hereby denied."

The District Court held in its first decree that those facts constituted an order, disobedience to which would be punishable (R. 222). Then followed a further hearing on the supplementary petition. Then the Commission made its report of October 9, 1929, now under consideration. The headnote reads as follows (R. 486):

> "Upon further hearing, application of commission's accounting regulations to statement of the investment accounts of the Atlanta, Birmingham & Coast Railroad Company as of January 1, 1927, considered and accounting *prescribed.*" (Italics added).

The last paragraph is as follows (R. 494):

> "Upon consideration of the record as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company, representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. *The company will be expected to adjust its accounts in accordance with this finding within sixty days from service of this report.*" (Italics added).

When the bill was presented to Mr. District Judge Sibley, the court, "to avoid consideration of a restraining order, requested the Commission to extend the effective date of this requirement to give time for a full hearing. The Commission did not disclaim its action as final but did extend the time of compliance for sixty days more." (R. 500).

The court in its last opinion, after making the statements referred to, said:

> "We think that the requirement is to be treated as an order, disobedience of which could be punished, and which may be reviewed in this court for the reason stated in our former opinion." (R. 500).

The sixty-day time limit was meaningless if that which the Commission had done was not the equivalent of an order. If there was no order, there was no sort of need of time limit. The moving forward of the time of the effective date of the report or order, as the case may be, at the instance of Mr. District Judge Sibley, would also have been meaningless if the Commission had not construed its action to be an order. The action of the Commission was in fact a supplementing of its previous orders which were issued as formal orders and became in effect a part of those formal orders; that is, the ones issued on October 26, 1926 (R. 31), and December 21, 1926 (R. 320). It "prescribed" certain action by the New Company. These actions of the Commission were then tied in on principle very much as in United States and I. C. C. vs. New River Company, 265 U. S. 533, where the court held:

> "An order of the Interstate Commerce Commission, in form dismissing a complaint of the shippers, but the effect of which was to require the observance of a rule of car distribution attacked in the proceedings as arbitrary, illegal and unconstitutional, held not a 'negative' order and reviewable in the District Court."

It will appear clearly that these actions of the Commission, culminating as above set out, amount to orders of the Commission which compelled the doing of affirmative acts.

Note the cases of:

New York Railway Co. vs. U. S., 14 Fed. (2d) 850;
Chicago Junction Case, 264 U. S. 258, 264;
U. S. vs. Illinois Central R. R., 244 U. S. 82;
Proctor & Gamble Co. vs. U. S., 225 U. S. 282;
Piedmont & Northern Ry. Co. vs. U. S., 280 U. S. 469.

The penalties prescribed by Section 20 of the Act to Regulate Commerce, sub-paragraph 7, include penalties for keeping "any other accounts, records, or memoranda than those *prescribed* or *approved* by the Commission." The penalties of this section of the Act are, therefore, imposed for the keeping of accounts, records, etc., other than those "*prescribed* or *approved* by the Commission."

The decision of this Court in the case of United States vs. Chicago, etc. Railroad Co., decided by this Court on January 5, 1931, would appear to be controlling on the question that the action of the Commission here involved is an order over which the Court has jurisdiction.

The action of the Commission prescribes (R. 486) and, as we contend, commands the keeping of certain accounts and certain records, and also commands that those accounts and records shall have certain contents. The Commission commands the carrier to enter its accounts in a designated way, with designated contents. Substance and not form controls.

The word "expect" has a secondary meaning, and this implies demand and not anticipation.

In the case of Sillman vs. Spokane Savings & Loan Society, 175 Pac. 296 (Wash.), the court held:

> "The primary meaning of the word 'expect' is doubtless as the applicant construes it; but the word has a sec-

ondary meaning, and its true meaning in any writing, like other words which may be used in varying senses, must be determined from the context of the writing and the circumstances surrounding its making."

Webster gives as one of the meanings of "expect," to demand; require. The author refers to this as obsolete. It is fair to presume that this is equivalent to "secondary."

It has been pointed out that in the headnote to the Commission's report of October 9, 1929 (R. 486), the Commission states that accounting is "*prescribed.*" The word "prescribe" means "to dictate; to give directions." (See Webster's International Dictionary.)

It would seem clear, therefore, that not only has it been adjudicated in the first decree that the report of the Commission was an order, but the Commission in effect so declares it.

III

THE CONSTRUCTION WHICH THE COMMISSION GIVES TO THE PROVISO TO ITS ORDER OF DECEMBER 21, 1926, BRINGS IT IN CONFLICT WITH PARAGRAPH (i) OF SECTION 19a OF THE INTERSTATE COMMERCE ACT

It is respectfully submitted that the proviso to the Commission's order of December 21, 1926, should be so construed as to make it harmonize with the duties of the Commission under the Act to Regulate Commerce and as well so as to make it harmonize with all of the provisions of that Act.

We now discuss the construction of this proviso independently of the decree of the court on the original bill.

The Commission's orders were arrived at by using the par value of the preferred stock plus the $4,080,699.80 paid by the Atlantic Coast Line Railroad Company to the reorganization committee of the Old Company, the purchaser, in settlement of prior claims as heretofore explained, and no part of which was received by the New Company. The Commission directed the New Company to enter this property on its books in Account 701, "Investment in Road and Equipment," upon a basis other than the cash value thereof.

The Commission in its report stated (R. 494):

> "Counsel for the new company also contends that paragraph (i) of section 19a requires that the value found under that section be treated as prima facie evidence of the value to be included in the investment accounts of the new company; *but we do not regard that value as pertinent or material evidence in the determination of investment, as that term is used in our accounting regulations.*" (Italics added).

This means that the Commission issued its orders without giving any effect whatever to the value of the property, although the court had in its first decree construed the language of the condition in the Commission's order as fixing the value of the property as the proper basis for the entry in said account (R. 221-223); and it also means that the Commission has given no force or effect whatever to the valuation of the property fixed by it under the provisions of Section 19a.

We respectfully assert that this action on the part of the Commission is in direct violation of the requirement of paragraph (i) of section 19a of the Interstate Commerce Act, which is in part as follows:

"All final valuations by the Commission and the classification thereof shall be published and shall be *prima facie evidence of the value of the property in all proceedings, under the Act to Regulate Commerce as of the date of the fixing thereof*, and in all judicial proceedings for the enforcement of the Act. * * *, and in all judicial proceedings to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission." (Italics added).

The direct words of this section require that the final valuations of the Commission "shall be prima facie evidence of the value of the property in all proceedings under the Act to Regulate Commerce."

The Interstate Commerce Commission had no power to proceed in a matter of this kind except "under the Act to Regulate Commerce." If it were proceeding within its jurisdiction, it was by that fact acting in a "proceeding under the Act to Regulate Commerce."

The Commission had no power to disregard its final valuation and in disregarding it, it proceeded in direct violation of the provisions of the Act. The question is not whether the *proper* weight was given to the valuation report, but it is that *no* weight was given to it. The Commission declared that this valuation was neither pertinent nor material.

In St. Louis and O'Fallon Railroad Co. vs. United States, 279 U. S. 461, 484, the court, speaking of paragraph 4 of Section 15a of the Act, and noting that it directs that in determining values of railway property for purposes of recapture the Commission "shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes and shall give to the property invest-

ment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes," said:

> "This is an express command; and the carrier has clear right to demand compliance therewith."

The court cites United States vs. Interstate Commerce Commission, 252 U. S. 178. In this latter case the Commission had refused to find the present cost of condemnation and damages or a purchase in excess of original cost, etc., of property. The court at page 187 said:

> "It is true that the Commission held that its non-action was caused by the fact that the command of the statute involved a consideration by it of matters 'beyond the possibility of rational determination,' and called for 'inadmissible assumptions,' and the indulging in 'impossible hypotheses' as to subjects 'incapable of rational ascertainment,' and that such conclusions were the necessary consequence of the Minnesota Rate Cases, 230 U. S. 352."

The court further said:

> "We are of opinion, however, that, considering the face of the statute and the reasoning of the Commission, it results that the conclusion of the Commission was erroneous, an error which was exclusively caused by a mistaken conception by the Commission of its relation to the subject, resulting in an unconscious disregard of its part of the power of Congress and an unwitting assumption by the Commission of authority that it did not possess."

The Commission appears to have acted in the case at bar in disregard of "an express command" of Congress, "and the carrier has clear right to demand compliance therewith."

IV

THE COMMISSION'S CONSTRUCTION OF THE PROVISO TO ITS ORDER OF DECEMBER 21, 1926 (R. 324), IF ALLOWED TO BECOME EFFECTIVE, WILL WORK GREAT HARDSHIP AND BRING ABOUT MANY INCONSISTENCIES

It will be remembered that the Commission's order was acted upon in the following manner:

The condition to the bid for the property was withdrawn and the bid made absolute and the property was conveyed to purchasers representing the reorganization committee; the purchasers caused the New Company to be created and to file its charter and proof of organization with the Commission, and the Commission issued its order of December 21, 1926; and then the purchasers of the property, acting on those two orders, conveyed the property to the New Company in consideration of its shares of stock, and the Atlantic Coast Line paid to the reorganization committee, in the manner which has been stated, the large amounts of money contemplated, and it was not until some months thereafter (August 3, 1927) that the Commission made its first construction of the proviso contained in its order of December 21, 1926 (R. 324), that "the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor" as requiring that the New Company set up against its common stock, not the value of the property which was received by it, but the $4,080,000 which it never received or had any interest in. That construction, if effective, will have the following results:

(a) It will require the New Company to make entry on its books under Account 701 of its "Investment in Road and

Equipment" at a figure which will have no relation to its investment or the value of the property received by it. The valuation of the property, made by the Commission, adjusted to improvements and betterments is very much greater than the figure prescribed by the Commission.

(b) It will require an entry under this account of a fictitious amount and will prohibit the carrier from keeping any other books or records in reference thereto, and will prohibit the carrier from so keeping its books or records in such manner that its correct financial condition is reflected thereby. It will require an entry upon the books and records of the New Company which will have to be proven to be untruthful in every rate investigation or in any other investigation wherein the value of its property is important, and it will prevent the carrier from exhibiting through its books to the Commission a proper statement either of its investment or of the value of the property. In other words, the books kept in the manner required by the Commission cannot be relied upon as speaking that truth which the New Company will be expected to produce to the court or to the Commission in any of these circumstances. The Commission recognizes that its orders require the entry of values not applicable to rate-making or to a fair return (R. 317); and, of course, it knows that the carrier can keep no other books or records.

(c) It will make the order of December 21, 1926, conflict with the provisions of Section 20 of the Act to Regulate Commerce which requires the carrier to show a complete exhibit of the financial operation of the carrier each year, including an annual balance sheet.

(d) It will require the New Company to so keep its books that depreciation cannot be properly set up as is allowed by

the Commission under Section 20, sub-section 5, of the Act to Regulate Commerce.

(e) If the books of appellee are kept as the proviso to the order under consideration is now construed by the Commission, it will be impossible for the appellee or the Commission to ascertain from its books, its reports, or records, whether or not there has been a net income in excess of six per cent of the value of the railway property as is contemplated by sub-section 6 of Section 15a of the Act, at which point the recapture provisions of the Act come into operation. Sub-section 6, referred to, contains the following:

> "If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of six per centum *of the value of the railway property* held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission," etc. (Italics added).

(f) The proviso, as the Commission now construes it, will make it impracticable for the carrier or the Commission to ascertain from its books what constitutes a fair return upon its property as is contemplated by sub-section 3 of Section 15a of the Act, which said sub-section 3 is as follows:

> "The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon."

(g) The order of the Commission, if given the construction contended for by it, will completely deprive the property investment account of the carrier of any evidential weight,

notwithstanding that sub-section 4 of Section 15a of the Act contemplates that it shall have evidential value.

(h) The proviso, as the Commission now construes it, will require the keeping of the carrier's books upon a basis which will reflect the value of its property wholly inconsistent with the standard of value fixed by this court in such cases as

Smyth vs. Ames, 169 U. S. 466, 547;
Minnesota Rate Cases, 230 U. S. 352;
Willcox vs. Consolidated Gas Co., 212 U. S. 19, 41;
St. Louis & O'Fallon Ry. Co. Case, 279 U. S. 461.

(i) Books kept on the plan as insisted upon by the Commission will be worse than valueless in matters affecting the credit of the New Company.

The question presented by this record is narrower than the power of the Commission to issue an order requiring even the hardships which would be required thereby. *The question in this connection is—Was the Commission correct in so construing the language of its proviso, after it had been acted upon, that it would inflict upon the New Company which had issued its securities for the consideration of the properties, the hardships referred to?*

The lower court held that "the words of the order of December 21, 1926, were acted on by the parties and should have their fair operation" (R. 221), and the court has held that their fair operation was different from the construction which the Commission put upon the words used. If the Commission had meant that the entry should be made not on the basis of the value of the properties received by the New Company from the sellers, to-wit, the representatives of the reorganization committee, but that the entry should represent only

a part of the consideration which the Atlantic Coast Line paid to that committee for the common stock, certainly it should have made that purpose clear before it was acted upon.

The Commission's Rule No. 41 contemplates that when properties are acquired by a rail carrier for a consideration other than cash, the "current cash value of the consideration" is to be entered in the accounts. The proviso fitted that condition and made reference to that rule, and the lower court has held that this Account 41, as well as the proviso, required the valuation of the property received by the New Company for its shares of preferred and common should be set up against the stock. This construction puts the action of the Commission in harmony with the whole scheme of the Act to Regulate Commerce and on a fair and rational basis and in harmony with the purposes for which accounts are kept, and is also consistent with the utterances of the Commission in the valuation proceedings and in its consolidation plans which have been referred to. Any other construction would impose upon the New Company unreasonable and harsh conditions, which would not serve the public and which would greatly injure the company in the respects above pointed out. The Commission's records are complete as to the history of this transaction. The New Company seeks no concealment. The Commission is possessed of all the information to be had on the subject. The Court's construction of the proviso avoids these hardships and inconsistencies.

In Kansas City Southern Railway Co. vs. United States, 231 U. S. 423, 440, this court, in dealing with the requirement of the Commission as to the distribution by the railroad of certain expenditures for operating costs and for additions and betterments, said:

"The very object of a system of accounts is to display the pertinent financial operations of the company and throw light upon its present condition. If they are to properly do this, the form must correspond with the substance."

In the opinion the court states (page 449) that one of the manifest objects of supervising accounts "was to enable the commissioners to intelligently perform their duties respecting the regulation of carriers' rates for the services performed," etc.

The construction which the Commission has undertaken to make of the proviso to its order, if effective, would destroy the use of the accounts of the carrier for any of the purposes for which the accounts are declared by this court in this opinion to be useful. Not only does it do that, but by preventing the carrier from keeping other records, accounts or memoranda, it makes it extremely difficult for the carrier to prove those things which are necessary to be proved in a number of circumstances, such as recapture of earnings, rate-making, depreciation, etc.

V

THE CASE OF PASSAIC CONSOLIDATED WATER COMPANY VS. BOARD OF PUBLIC UTILITY COMMISSIONERS

The construction which the Commission gives to the proviso in its order of December 21, 1926, is in conflict with the above mentioned case, which appears to be especially apposite to the case at bar. The Passaic case is from the Supreme Court of New Jersey (5 N. J. Misc. 1078—139 Atl. 324) and was affirmed by the Court of Errors and Appeals of that State, 104 N. J. 666 (141 Atl. 921). It involved an order

of the public utility commissioners, affecting the accounts of the Passaic Consolidated Water Company. The Water Company is a consolidation, October 26, 1923, of five companies. On March 7, 1923, the Commission had fixed the value of the property of those companies at $11,500,000 of which $300,000 was designated as working capital.

> "The Board in its approval of the consolidation directed that the books of the prosecutor should be opened on the basis of consolidated book costs, as shown in an exhibit referred to in said proceedings as Exhibit P-2. This exhibit fixed the valuation of the plant and working capital at the figures hereinbefore mentioned."

The Water Company opened its books on the basis of the consolidated book costs as of December 31, 1928, continued to the date of the merger, which was November 1, 1923. In its annual report for the year ending December 31, 1924, it used a different set of figures. In these figures the amount of fixed capital was of December 31, 1923, entered at $23,170,398, and after deducting depreciation reserve set up as a liability, it set up a net amount as fixed capital of $20,209,714. This was done as the result of an appraisement made by an expert in the valuation of public utilities. The Board objected to these figures and entered an order requiring that the books of account be conformed to the decision of the Commission of October 26, 1923, approving the consolidation, and to modify the charges made for depreciation, to rewrite its books of accounts and upon approval of the amended annual report the Water Company was not to set up other or different bases of fixed capital than that so approved. The court set aside this order of the Commission, holding:

"Upon the regulation of a public utility corporation by a board of public utility commissioners, all the incidents of ownership, except in so far as it may be necessary to curtail them to properly exercise the power of regulation, remain with the corporation."

The court also held:

"The right to regulate a utility does not destroy the right of private ownership."

"All the incidents of ownership, except in so far as it may be necessary to curtail them to properly exercise the power of regulation, remain with the corporation. If the order of the board is arbitrary and unreasonable and beyond the powers given to it by the statute, it is void. It seems to us that one of the rights of private ownership is the keeping of accounts, not solely for the purpose of establishing a basis for fixing rates, but for such other matters as appertain to the ordinary business of a utility corporation. It owes to its stockholders certain rights that may require an entry upon its books of what it determines to be the fair value of the property. It must be recognized that when a board is fixing a basis for rates it may perchance mistakenly undervalue the property of the utility or eliminate from the valuation elements which in the past have required the expenditure of considerable funds."

"In ascertaining the income and excess profits upon which taxes have to be paid to the federal government, for example, it is fair that the full value of the property should be used. To use it requires that such a valuation shall be entered on the books of account. In the event of the sale of any of the company's property for which it has no longer use, there should be a record of the true value of such property. These illustrations might be multiplied. They are only used for the purpose of showing that in the conduct of the affairs of a corpora-

tion questions regarding its property will arise which require that there be entered upon its books other entries than that of the valuation fixed by the utility board for rate-making purposes."

We respectfully submit that this case is precisely in point and that its expressions are entirely in accord with the opinion of this court in Kansas City, Southern Railway case, 231 U. S. 423, 449.

VI

SOME OF THE THINGS FOR WHICH A SYSTEM OF ACCOUNTS OF A RAILROAD COMPANY SHOULD BE USEFUL AND AS TO WHICH THE ACCOUNTS WOULD BE RENDERED WORSE THAN USELESS IF THE COMMISSION'S CONSTRUCTION HOLDS

Fair Return

It is contemplated by Section 15a, sub-division 2 of the Interstate Commerce Act, that the carrier shall have a fair return upon the aggregate value of its railway property. Of course, books kept under the requirements of the Commission's construction of its proviso to its order of December 21, 1926, will be worse than useless as to this.

Evidential Value of Books

Sub-section 4 of Section 15a contemplates that the property investment account of the carrier shall have evidential value. If the Commission's construction of the proviso to its order prevails, that evidential value will be inconsistent with the facts, will contribute to injustice, and will be contrary to the purposes of sub-section 4 of Section 15a.

Recapture of Earnings

Sub-section 6 of Section 15a provides for the recapture of a part of the net railway income in excess of six per centum "of the value of the railway property." The Commission's construction of the proviso to its order would make the carrier's account worse than useless in this connection.

Credit Standing

The carrier's accounts should properly reflect its condition so as to enable it to procure for itself its best credit standing. Books kept according to the Commission's construction of its proviso will not be helpful to credit standing, but destructive of it.

Taxation

The books of the carrier should reflect the value of its property which is considered in determining the amount of the tax based on excess profits or on any other method to which value is material. Books kept according to the Commission's construction of the proviso to its order would produce results unjust both to the carrier and to the public in such matters of taxation.

Stockholders

The condition of the books should properly reflect the status of the carrier to its stockholders. Books kept in accordance with the Commission's construction of its proviso would defeat this purpose.

PROPERTY INVESTMENT

The property investment account of the carrier should be of great value to it, especially so when kept consistently with the provisions of Section 19a of the Act.

The Kansas City Southern Railway case, 231 U. S. 449, evidently contemplates that this account is to be given substantial weight in reflecting the value of the property used in the public service. The value of property used in the public service is, of course, of great importance in determining the reasonableness of rates.

The property investment account kept in accordance with the Commission's construction of its proviso would not only make the investment account valueless but worse than valueless.

DEPRECIATION

A correct property account is necessary to the depreciation contemplated by Section 20, sub-paragraph 5 of the Act. Unless this account be kept to represent "present fair value" of the depreciable property, the account will be worse than useless.

United Railways vs. West, 280 U. S. 234, 254.

It is impossible under the Commission's construction of the order "to make full, true and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the carrier's business," as is required by Section 20, sub-section 7 of the Act.

The court below in both of its decrees thought that the proviso should not be construed so as to give it these effects. It will appear beyond any contradiction that the construction

of the proviso made by the Commission, after it had been acted upon, if allowed to become effective, will give to its order an unnatural and burdensome operation which can be of no value to the public or to the Commission or to the carrier and which can be of very great harm to the public, the Commission, the carrier, and to all other persons at interest. The language of the proviso does not require this construction and it ought not to be inflicted upon those who have acted on the order before this construction was made.

VII

THE CONSTRUCTION WHICH THE COMMISSION PLACES ON THE PROVISO TO ITS ORDER OF DECEMBER 21, 1926, WOULD MAKE THAT ORDER TO EXCEED ITS JURISDICTION

Of course, the Commission's order should be construed to be within the Commission's jurisdiction if that is possible.

Section 20a, sub-division 5 of the Act, authorizes the Commission to "prescribe the *forms* of any and all accounts, records and memoranda to be kept by the carriers subject to the provisions of the Act," etc. This part of the Act had its beginning in the Hepburn Act of June 29, 1906 (39 Stat. L. 594, § 7). This provision of the Hepburn Act was taken "in literal and exact terms from the draft of the bill submitted to Congress by the Commission in 1905, the passage of which it recommended."

U. S. vs. N. C. & St. L. Ry., 217 Fed. 254, 263.

Recommending the adoption of the amendment to Congress, the Commission said:

"An efficient means of discovering illegal practices would be found, as we believe, in authority to prescribe the *form* in which books of account shall be kept by railways, with the right on the part of the Commission to examine such books at any and all times through expert accountants. This recommendation has been urged upon the attention of Congress in previous reports, and we earnestly renew it at this time. Probably no one thing would go further than this toward the detection and punishment of rebates or kindred wrongdoing. (Nineteenth Annual Report of Interstate Commerce Commission, 1905, at pp. 11, 177, 182)." (Italics added).

217 Fed. 264.

It should be borne in mind that there was no order of the Commission that the accounts of the carriers should be set up as is now contended for until after the parties had acted upon the orders of October 26, 1926, and of December 21, 1926. The Commission did not construe the proviso to its order of December 21, 1926, so as to prevent the New Company from setting up the value of its property on its books until August 3, 1927, and April 9, 1928. The New Company did not construe the order as preventing it from setting up on its books the value of the property which it had "received" for its shares of stock, and when it "received" that property and when it did set up its books there had been no ruling of the Commission that it should not set up its books so as to reflect the value of that property. The court below has twice sustained the basis for setting up the books used by the New Company and by the same act has twice condemned the construction of the proviso made by the Commission. If the Commission had intended to prescribe the contents of the books and records of the New Company, it should have spoken in clear and certain language before the parties acted

upon its order, which certainly had no such necessary meaning.

The Commission's construction of its order prevents the carrier from setting up its property on its books so as to reflect the "basis for rate-making" (R. 317), and also requires the books to be set up in a manner which not only makes them useless in a rate-making controversy, in the ascertainment of a fair return, in the ascertainment of the recapture rights, and in use in tax matters such as excess profit taxes, and in ascertaining depreciation, but it makes them worse than useless.

We are not dealing with circumstances where the Commission had ordered these consequences before the parties had acted. The parties in the case at bar had acted upon the order of the Commission which, properly construed, had, we respectfully submit, no such effect as that now attributed to it by the Commission. It is not as though either the original purchasers or the New Company went into the transaction knowing the Commission's construction of its proviso. On the other hand, they went into this situation with the order of December 21, 1926, normally meaning that the property acquired by the New Company should be set up on its books on the basis of the value of that property. After the parties are committed, the Commission by a construction of its proviso undertakes to prohibit the New Company not only from setting up its books on that basis but commands the New Company to set up its books in a manner which will handicap, if not prevent, it from proving the values of its property when those values may become vital to it.

The moneys which the Atlantic Coast Line Railroad Company paid under the terms of the agreement here involved

were no more received by the New Company than was the fund of $1.50 per share, which was involved in the case of United States vs. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, decided by this Court on January 5th, received by it. In the Chicago and St. Paul case the carrier had a "speculative possibility" in some remainder of that fund. In the present case the New Company had no kind of interest, present or contingent, therein.

VIII

TERMS AND CONDITIONS

The Commission's action is based upon the provisions of Section 20a, sub-division 3 of the Act, which allows the Commission to grant application for the issuance of securities in part, or deny it in part, or to grant it with such modifications and "upon such terms and conditions as the Commission may deem necessary or appropriate in the premises." Section 20a is an amendment to the Act, coming into it on the 28th of February, 1920. It is not an independent section and is not to be independently construed. It is a part of a system which had been long in use and the amendment must be harmonized with the other parts of the system; for, after all, it becomes a part of the system and the system is one whole.

Note:

Robinson vs. Baltimore & Ohio Railroad Co., 222 U. S. 506-512;

Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co., 204 U. S. 426-448;

Lewis, Sutherland Statutory Construction, 2nd Ed., Vol. 2, p. 847, §§ 443 and 448, and authorities cited.

Statutes, of course, are to be construed so as to avoid hardship and unjust consequences unless the language compels such a result.

See Bankers Trust Co. vs. Bowers, 21 A. L. R. 922, (292 Fed. 793) 25 R. C. L. 1022.

"The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency."

25 R. C. L., 1008, § 247.

Note:

United States vs. Landram, 118 U. S. 81, 85.

If Section 20a, sub-division 3, is construed so as to permit the Commission to prescribe any kinds of terms or conditions which it may deem best, it gives to it power to destroy or supersede any part of the Act. The accounting provisions of the Act (Section 20), as we have pointed out, limit the Commission's power to prescribing *forms* of accounts, and this preserves the carrier's initiative which this court has always been zealous to preserve.

Note:

I. C. C. vs. Chicago Great Western Ry., 209 U. S. 109, 119;
Great Northern Ry. vs. Minnesota, 238 U. S. 340, 346;
Southwestern Bell Telephone Co. vs. Commission, 262 U. S. 276, 289.

The general words of sub-section 3 of Section 20a, above quoted, are to be construed with reference to the particular subject then at hand, and the general terms and conditions which the Commission may prescribe are those which deal with the issuance of the securities; that is, as to the terms of

the instruments, the manner in which they will be secured, the rates of interest, the times of payment, the rights of calling for prepayment, and the cost of the issuance of the securities to the carrier, and the minimum rate at which the securities are to be sold. If these words are not confined to that subject, they then apply to any subject affecting the company issuing the securities, and they will then give to the Commission the power to upset all other provisions of the Act.

The New Company accepted the orders of the Commission of October 26, 1926 (R. 311-319), and of December 21, 1926 (R. 320-324). It construed those orders and especially the proviso to the order of the Commission of December 21, 1926, as requiring that its Account 701, "Investment in Road and Equipment," be set up on the basis of the value of the property acquired by the New Company in consideration of its shares of stock, common and preferred. It believed that that value should reflect every element for which value of property is useful to such a carrier. It acted upon that construction. The New Company submits that on the face of the proviso it was justified in so acting upon it; that no other construction can make that proviso harmonize with all parts of the law.

It cannot be that the Commission in granting to a carrier by railroad the right to exercise a privilege granted by the State can do so on condition that the carrier be required to surrender a right guaranteed to it by the Constitution of the United States.

Note the cases of:

Terral vs. Burke Construction Co., 257 U. S. 529, 532;
Frost Trucking Co. vs. Commission, 271 U. S. 583, 593;
Hanover Fire Ins. Co. vs. Harding, 272 U. S. 494, 507;

Adair vs. U. S., 208 U. S. 161, 180;
Western Union vs. Kansas, 216 U. S. 1, 47.

The New Company has a constitutional right to a fair return on the value of its properties used in the public service in the manner and to the extent determined by frequent decisions of this Court. To require that the carrier shall surrender important means of availing itself of that right is equivalent to depriving it to that extent of that constitutional protection.

C. B. & Q. R. R. vs. Osborne, 265 U. S. 14, 16.

The power to regulate commerce is not absolute, but is subject to the limitations and guaranties of the Constitution. (U. S. vs. Chicago, etc., R. R. Co.) This power does not apply to that which is not interstate commerce. The Commission's construction of the proviso to its order, undertaking thereby to deal with that money as though it were interstate commerce, will make the Commission's order in that respect to exceed its jurisdiction.

The Commission, by the construction which it undertakes to put on the proviso to its order of December 21, 1926, has undertaken to deprive the carrier of the right to keep the accounts and records necessary to prove the value of its properties in controversies concerning rates, returns, taxes, and as well as in other matters. The proviso to said order, we respectfully submit, bears no such construction, and one reason why it should not bear such construction is that, being so construed, it will require the carrier to strip itself of means necessary to it in the preservation of its constitutional rights.

For all the reasons herein stated, it is respectfully submitted, that the decree of the lower court should be affirmed or the appeal dismissed upon the motions submitted.

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APPENDIX

Section 20 (7) of the Act:

"Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier's business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment: *Provided*, That the Commission may in its discretion issue orders specifying such operating, accounting, or financial papers, records, books, blanks, tickets, stubs, or documents of carriers which may, after a reasonable time, be destroyed, and prescribing the length of time such books, papers, or documents shall be preserved."

Account 41—Cost of Road Purchased (R. 435):

"This account shall include the cash cost of any road or portion thereof purchased. Where the contract of purchase includes not only road, but also equipment, securities, and other assets, the appraised value of such equipment, securities, and other assets shall be deducted from the total cash cost, and the remainder of the cash cost shall be charged to this account. Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current

cash basis. If the consideration includes the assumption of liabilities, such liabilities shall be included in the determination of the cost at their cash value at the time the contract is made.

"This account shall be used only as a clearing account in which temporarily to carry the cost of road purchased until such time as a plan for distributing such cost to the primary accounts appropriate for the property is approved by the Commission.

"Note A—The appraised value of any equipment thus acquired shall be charged to the appropriate equipment accounts. The value, at time of purchase, of any securities, or other assets acquired, shall be included in the accounts appropriate for such assets. The par value of any liabilities assumed shall be included in the appropriate liability accounts, and the necessary adjustments between the cash value charged to the property accounts and the par value shall be made in the appropriate premium or discount account.

"Note B—The carrier shall be prepared to furnish the Commission, upon demand, a full report of the contract of acquisition of each road, or portion thereof, purchased, and a statement showing in detail the consideration given therefor. It should procure, in connection with the acquisition of any such road and equipment, all existing records, memoranda, and accounts in possession or control of the grantor, relating to the construction and improvements of such road and equipment, and shall preserve such records, memoranda, and accounts until authorized by law to destroy or otherwise dispose of them. Where the records, memoranda, and accounts are so intimately involved with other records, memoranda, and accounts of the grantor as to make their transfer impracticable or inadvisable, certified copies of them shall be procured and retained by the grantee. The verity of the copies should be certified by the custodian of the originals."